

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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7/5
74-1589

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES W. FREDRICKSON,

Defendant-Appellant.

ON APPEAL FROM THE DECISION OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

PAUL I. AUERBACH

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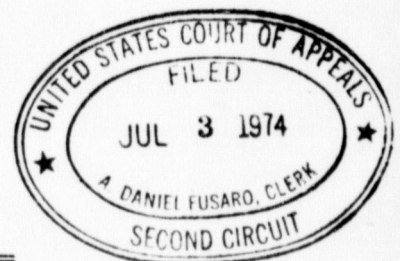
PAUL J. CURRAN

*United States Attorney for the
Southern District of New York*

Federal Court House

Foley Square

New York, New York



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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT
JUDGE MOTLEY

73 CRIM. 282

D. C. Form No. 100 Rev.

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

vs.

CHARLES W. FREDRICKSON

For U. S.:

Douglas F. Eaton, AUSA
(212) 264-6434

For Defendant:

(03) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk				
J.S. 3 mailed ✓	Marshal				
Violation	Docket fee				
Title 26					
Sec. 7201					
Income tax evasion.					
(Three Counts)					

DATE

PROCEEDINGS

4-2-73	Filed indictment.
4-16-73	Def't. leads not guilty. Def't. R.O.P. - Def't. ordered photographed and fingerprinted. Case assigned to Judge Motley. --- Lasker, J.
4-24-73	Filed notice of appearance by Charles W. Fredrickson-Rt. 17 Tuxedo, New York (914) 351-4717.
6-18-73	Filed notice of appearance of Paul I. Auerbach, Box. 6, Tappan, N.Y. 10983
12-11-73	Trial begun (JURY)
12-12-73	Trial cont'd.
12-13-73	Trial cont'd.
12-14-73	Trial cont'd - Jury unable to agree upon a verdict. Mistrial declared by the Court....Motley, J.

DATE

PROCEEDINGS

2-17-74

2-20-74 Trial cont'd & concluded...Deft GUILTY as charged. Deft R.O.R. Sent, adjd to 11 a.m. April 16, 1974

2-25-74 Filed Govt's memorandum of law.

2-25-74 Filed deft's memorandum of law.

4-16-74 Filed notice of appeal from judgment of 4-16-74...copy mailed to deft at P.O. Box 667 Route No. 17 Tuxedo, N.Y. 10987 and U.S. Atty's office.

4-16-74 Filed transcript of record of proceedings dtd: Feb. 19-74-10:15A.M.

4-16-74 Filed Judgment (Atty. Paul I. Auerbach, present) the deft is committed for imprisonment for a period of ONE YEAR and ONE DAY on each of Counts 1, 2 and 3 to run concurrently with each other. Deft released on his own recognizance until 10 A.M., April 23, 1974 at which time the deft will surrender to the UNITED STATES MARSHAL in room 506 to commence service of sentence.....Motley, J.....Ent. on docket 4-17-74.

4-19-74 Filed unsigned order to show cause with memo endorsed...The within and attached are construed as a motion for bail pending appeal...the motion is granted and deft is released on his own recognizance pending appeal.....Motley, J.

5-6-74 Filed notice that 1st supplemental record has been certified and transmitted to the U.S.C.A.

5-11-74 Filed notice that supplemental record on appeal has been certified and transmitted to the U.S.C.A.

6-4-74 Filed transcript of record of proceedings, dated 12-11-73

6-24-74 Filed true copy of U.S.C.A. order that the appeal from the judgment of the U.S.D.C. is dismissed. m/n

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 CRIM. 282

UNITED STATES OF AMERICA,

-v-

CHARLES W. FREDRICKSON,

Defendant

INDICTMENT

73 Cr.

COUNT ONE

The Grand Jury charges:

On or about the 18th day of April, 1967,

CHARLES W. FREDRICKSON, the defendant, who at that time and during the calendar year 1964 resided and conducted his business within the Southern District of New York, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the income tax due and owing by him and his wife, Ruth I. Frederickson, to the United States of America for the calendar year 1964, by preparing and causing to be prepared, and by filing and causing to be filed with the District Director of Internal Revenue, Albany, New York, a false and fraudulent joint income tax return on behalf of himself and his wife, wherein it was stated that their taxable income for said calendar year was \$10,232.65 and that the income tax due thereon was \$2,011.67, whereas the defendant then and there well knew that their taxable income for said calendar year was approximately \$16,470.77, upon which taxable income there was due and owing to the United States of America an income tax of approximately \$3,557.60.

(Title 26, United States Code, Section 7201)

The Grand Jury further charges:

On or about the 18th day of April, 1957,

CHARLES W. FREDRICKSON, the defendant, who at that time and during the calendar year 1955 resided and conducted his business within the Southern District of New York, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the income tax due and owing by him and his wife, Ruth I. Fredrickson, to the United States of America for the calendar year 1955, by preparing and causing to be prepared, and by filing and causing to be filed with the District Director of Internal Revenue, Albany, New York, a false and fraudulent joint income tax return on behalf of himself and his wife, wherein it was stated that their taxable income for said calendar year was \$0.00 and that the income tax due thereon was \$0.00, whereas the defendant then and there well knew that their taxable income for said calendar year was approximately \$37,171.46, upon which taxable income there was due and owing to the United States of America an income tax of approximately \$10,649.62.

(Title 26, United States Code, Section 7201)

COUNT THREE

The Grand Jury further charges:

On or about the 18th day of April, 1957, CHARLES

W. FREDRICKSON, the defendant, who at that time and during the calendar year 1956 resided and conducted his business within the Southern District of New York, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the income tax due and owing by him and his wife, Ruth I. Fredrickson, to the United States of America for the calendar year 1956, by preparing and causing to be

prepared, and by filing and causing to be filed with the District Director of Internal Revenue, Albany, New York, a false and fraudulent joint income tax return on behalf of himself and his wife, wherein it was stated that their taxable income for said calendar year was \$0.00 and that the income tax due thereon was \$0.00, whereas the defendant then and there well knew that their taxable income for said calendar year was approximately \$31,998.50, upon which taxable income there was due and owing to the United States of America an income tax of approximately \$8,541.95.

(Title 26, United States Code, Section 7201)

FORWARDED

SILVIO J. HOLLO
Acting United States Attorney

United States District Court
FOR THE

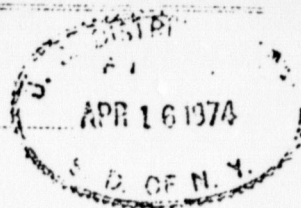
SOUTHERN DISTRICT OF NEW YORK

United States of America

v.

No. 73 CR. 282

CHARLES W. FREDRICKSON



On this 16th day of APRIL, 1974 came the attorney for the government and the defendant appeared in person and by Paul I. Auerbach,

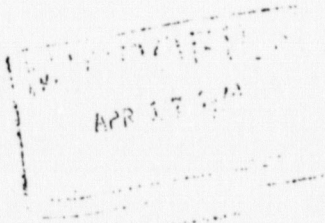
It Is ADJUDGED that the defendant upon his plea of Not Guilty and a verdict of Guilty by a jury, has been convicted of the offense of unlawfully, wilfully and knowingly attempting to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America, by preparing and causing to be prepared, and by filing and causing to be filed with the District Director of Internal Revenue, Albany, New York, a false and fraudulent joint income tax return on behalf of himself and his wife for the calendar years 1964, 1965 and 1966 (Title 18, United States Code, Section 7201),

as charged* in Counts 1, 2 and 3, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is ADJUDGED that the defendant is guilty as charged and convicted.

It Is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR AND ONE (1) DAY on each of Counts 1, 2 and 3 to run concurrently with each other. Defendant released on his own recognizance until 10:00 A.M., April 23, 1974 at which time the defendant will surrender to the United States Marshal in Room 506 to commence service of sentence.

It Is ADJUDGED that*



It Is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to*

United States District Judge.

Clerk.

*Insert "by name of counsel, counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel. *Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. *Insert "in counting number." *Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. *Enter any order with respect to

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THE COURT: I have just gone over this lengthy voir dire which the defendant has submitted here and, of course, we are going to have to take these up before the jury is brought up. I also gather that this is a memorandum that the defendant has submitted on this question of a loan, as requested by the Court?

MR. AUERBACH: Yes, your Honor.

THE COURT: I still don't understand your position, having read it twice now.

I have one from the Government.

(Pause)

THE COURT: Let's take these voir dire questions. Does the Government have any voir dire questions?

MR. EATON: No, your Honor. The Government would just ask that the same questions be repeated that your Honor asked. I think they fell in three categories, first of all, whether any juror had had a controversy with the Internal Revenue Service, second of all a question requested by Mr. Auerbach originally, that they would not be prejudiced against the testimony of a psychologist, and, third, whether they knew some of the names that are likely to come up. I have a handwritten list of those names again. There may be a few more but --

THE COURT: These are prospective witnesses?

in a criminal case and I will not hear it.

MR. EATON: The second thing, your Honor, is exactly how we are going to deal with the fact that there was a previous trial here. Normally, the way we phrase it is witnesses are instructed to simply refer, if it's necessary, to a prior proceeding in this case, without telling the jury that it was, in fact, a previous jury trial. I just wanted to find out what Mr. Auerbach's feelings on that were.

THE COURT: Just refer to it as a prior hearing on this matter, if you have to cross examine any witnesses.

With respect to this memorandum of law you have submitted, Mr. Auerbach, on the question of loan, I don't understand it. It is not comprehensible to me what your position is. Do you want to tell me now what your position in this case is going to be?

MR. AUERBACH: My position is twofold, your Honor. On the question of a loan, it is the defendant's contention that at the time of the taking or the loss was discovered, immediately thereafter by the defendant signing the confession of judgment and attempting to make repayment, that that taking was, in fact, an unauthorized loan and, therefore, not taxable income. It is the defendant's contention that the money --

THE COURT: What case do you cite for that?

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2 its taxes.

3 On the other hand, the defendant further contends
4 that, by reason of a diminished mental responsibility at
5 the time of the filing of his tax return, even though a very
6 short period in time, maybe two or three months before, he
7 did have knowledge of the fact of these monies, that when he
8 sat down to prepare the return, they were effectively blocked
9 out of his mind because of this mental problem, and for that
10 reason the specific intent cannot be sustained and, therefore,
11 on those grounds the defendant moves for dismissal.

12 Those are the prime contentions of the defendant.

13 THE COURT: Well, in other words, we have the same
14 inconsistent defense we had the last time.

15 MR. AUERBACH: Yes.

16 THE COURT: On the one hand he claims he viewed
17 it as a loan when he filled out his return and, therefore, did
18 not include it. On the other hand, you say his mental
19 condition blocked it out of his mind and he didn't consider
20 it at all, is that it?

21 MR. AUERBACH: No, your Honor. If I may, I am
22 saying at the time he executed the confession of judge --

23 THE COURT: I am taking only now -- let's stick
24 with this now -- we are taking now about the time he made out
25 the tax return.

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2 MR. AUERBACH: There was no contention that at
3 the time of filling out the return these monies were in his
4 mind at all. The reason they were not in his mind is as
5 follows: If he had thought of them, he would have treated it
6 as a loan and would not have reported it. In the alternative,
7 the mental condition was such that he did not think of it
8 at all.

9 THE COURT: Your position is that at the time he
10 filed a return, it was not in his mind at all?

11 MR. AUERBACH Yes.

12 THE COURT: He forgot about the money, is that
13 it?

14 MR. AUERBACH: Right.

15 THE COURT: Then you say if he remembered the
16 money, he would have treated it as a loan?

17 MR. AUERBACH: Correct, your Honor, exactly the
18 defendant's position.

19 THE COURT: Well, there is a problem with that,
20 if he had thought of it?

21 MR. AUERBACH: The idea is, your Honor, when he
22 executed -- yes, that is the statement. Would that it were
23 in his mind, he would not have reported it because he would
24 have treated it as a loan.

25 THE COURT: Mr. Reporter, will you transcribe just

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2 firm as a full-fledged lawyer, specializing in tax law.

3 In 1960 he left that Wall Street law firm and
4 opened up his own law practice in Tuxedo, New York, and he
5 became the attorney for a number of people, including a
6 wealthy, elderly couple named Mr. and Mrs. Lee, who lived
7 up there in Tuxedo.

8 Mr. Cornelius Lee, and his wife Chloise Lee have
9 both died. But at the time Mr. and Mrs. Lee needed to have
10 nurses just about night and day, they needed to have people
11 look after them and take care of them, they needed to have
12 someone write checks on their checking account for all of
13 the expenses, and they had quite a number of expenses, and
14 since they were so old they needed someone and in 1961 Mr.
15 Fredrickson obtained the power of attorney on Mrs. Lee's
16 checking account, and that meant that he could sign checks
17 on their checking account, and it is a perfectly legitimate
18 type of arrangement, the power of attorney, and nothing
19 unusual happened for several years, until 1964, 1965 and
20 1966. During those three years Mr. Fredrickson used 890 of
21 Mrs. Lee's checks for his own personal use. He made these
22 checks out to the order of sporting goods stores, and other
23 people, and he bought camping gear and rifles and all kinds
24 of other items for his own personal use.

25 Now, on the very first few of these checks, the

1 to object to any continued reference to proving the crime
2 of embezzlement. There is no charge for it here and by
3 proving a collateral crime would unfairly prejudice the
4 defendant. I feel that even the references at this point
5 to the crime of embezzlement and attempting to prove that
6 crime, which has nothing to do with the issue before the
7 Court, tax evasion, has put the defendant in an unfair posi-
8 tion.
9

10 THE COURT: The Government's burden is to prove
11 that he misappropriated this money.

12 MR. AUERBACH: No. The intent the Government has
13 to prove is the intent of specifically intending to defraud
14 the Government, not the intent to take the money by embezzle-
15 ment.

16 THE COURT: The fact that the money was embezzled
17 would go to the question of whether he intended to pay.

18 MR. AUERBACH: No, your Honor --

19 THE COURT: Objection overruled.

20 MR. AUERBACH: Respectfully except.

21 (In open court)

22 MR. EATON: As I say, since the crime charged is
23 tax evasion, you are going to have to decide whether in
24 April, 1967, Mr. Fredrickson acted with criminal intent and
25 deliberately intended to cheat the U. S. Government.

XXX

A Yes. . .

A Yes.

Q This schedule --

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Watson-Direct

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1 A This is a typed version --

2 Q Did you compare this with the handwritten copy?

3 A Yes, back then, yes, we did.

4 Q You, yourself?

5 A That, I don't recall. I remember being there at
6 the time it was done.

7 MR. AUERBACH: I object, your Honor.

8 THE COURT: Overruled.

9 (Government's Exhibit 923 received in evidence.)

10 DIRECT EXAMINATION RESUMED

11 BY MR. EATON:

12 Q Let me show you another document, Government's
13 Exhibit 924 for identification. Do you recognize that?

14 A Yes, I do.

15 Q Could you tell the jury what that is?

16 A This is an affidavit of confession of judgment
17 which was signed by Charles W. Fredrickson on November 16,
18 1966, and the confession judgment to Mrs. Lee in the amount
19 of \$79,827.12, and I was present when that was signed.

20 Q Is that amount at least approximately the amount
21 in the schedule?

22 A That was the amount which was obtained by adding
23 up on the adding machine that was there all the checks, the
24 890 checks that were segregated from the balance of the check.
25

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Watson-Direct

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1 THE COURT: Were these notes you made as you went
2
3 along?

4 THE WITNESS: Not physically, no, your Honor.
5 These are notes that I make on a dictating machine at the
6 end of a phone conversation.

7 THE COURT: That is what you are getting at, whether
8 these are his recollections past recorded?

9 MR. AUERBACH: The question is, immediately after
10 a conversation I assume he dictated a memorandum of some
11 sort, and was that memorandum reviewed when it was typed
12 up and at that time was it his recollection that these were
13 accurate notes. I don't know whether they were, in fact,
14 reviewed within --

15 THE COURT: Suppose you tell us what they are, these
16 notes.

17 THE WITNESS: These are what I call register entries
18 that I, as a lawyer -- the only thing I have to sell is time
19 and I keep a record of time and I keep for my own information
20 and for continuity a record of what I do.

21 THE COURT: Then somebody types it up for you?

22 THE WITNESS: Yes, necessarily. This is reviewed
23 by me after it is typed up and if there are corrections, I
24 will make them or have them made.

25 THE COURT: All right, proceed.

2 Q Is the amount still owing approximately \$44,000?

3 A At this point it would be slightly lower than that.
4 Since this letter was written, approximately 200 more dollars
5 has come in. I would say 43,750, roughly, as of this moment.

6 MR. EATON: No further questions, your Honor.

7 THE COURT: At this time we will take a ten-minute
8 recess. The jury is excused.

9 (The jury leaves the courtroom.)

10 THE COURT: The witness is excused for ten minutes.

11 (The witness leaves the courtroom.)

12 (Recess)

13 (In open court)

14 D A V I D P. H. W A T S O N, resumed.

15 CROSS EXAMINATION

16 BY MR. AUERBACH:

17 Q Mr. Watson, you are an attorney duly admitted to
18 practice law in the State of New York?

19 A I am.

20 Q Are you familiar with the crime of embezzlement?

21 A Yes. I wouldn't consider myself an expert. I am
22 not a criminal lawyer.

23 Q Do you know the elements of the crime of embezzle-
24 ment?

25 MR. EATON: Objection, your Honor.

2 THE COURT: Sustained.

3 Q Is it a fact that one of the elements of the
4 crime of embezzlement is that there is an intent to deprive
5 a rightful owner of property?

6 MR. EATON: Objection.

7 THE COURT: Sustained.

8 Q Mr. Watson, when you reviewed in August of 1967
9 what had preceded with relation to the funds of the Lees,
10 did you make a determination in your own mind as to whether,
11 in fact, there was an embezzlement?

12 MR. EATON: Objection, your Honor.

13 THE COURT: Sustained.

14 Q Mr. Watson, what did you mean on August 24, 1967,
15 when you used the word "embezzlement"?

16 MR. EATON: Objection, your Honor.

17 THE COURT: Are you referring to a document written
18 by --

19 MR. AUERBACH: I am referring to Government's
20 Exhibit 941 for identification, which was a memorandum of
21 a telephone conversation held on August 24, 1967, between the
22 witness and the defendant.

23 MR. EATON: Your Honor, the only legal significance
24 of the fact that Mr. Watson used that word to Mr. Fredrickson
25 was the impact that it had on Mr. Fredrickson's mind. It has

no relevance as to whether Mr. Watson was correct in using that word.

THE COURT: Well, that is why the question is probably proper, what did he mean. The other objections were sustained because no witness was called to tell the jury what the law is or what elements constitute a specific crime, but he can say what he had in mind at that time.

A Could I have the question again, please?

MR. AUERBACH: Mr. Reporter.

(Question read)

A I would say that I meant a wrongful taking without permission of the owner of the funds.

Q Did you, when you used the word "embezzlement" in August 1967, assume an intent to deprive the proper owner --

THE COURT: You can't ask this witness what elements constitute embezzlement. That is a legal conclusion. You asked him what he had in mind and he has told you that and you cannot examine him as to the law of embezzlement.

MR. AUERBACH: Your Honor, I am not examining as to the law of embezzlement; I am asking if he had that in his mind.

THE COURT: He told you what he had in mind.

MR. AUERBACH: May I inquire further as to what he had in his mind?

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2 THE COURT: No, because you are going into the

3 elements of the crime of embezzlement.

4 MR. AUERBACH: He has repeatedly on August 24th, August

5 28th, August 29th, and October 13th referred to the word

6 "embezzlement," and my question to the witness at this time,

7 your Honor, is whether when he referred to the crime of

8 embezzlement or referred to embezzlement he had in mind the

9 question of whether or not the defendant intended to deprive

10 the proper owner, the legal owner, of funds, and I think

11 that is a valid question on that point.

12 THE COURT: And I have ruled he has already

13 answered that question, what he had in mind.

14 MR. AUERBACH: Your Honor, you have ruled with rela-

15 tion to August 24, 1967.

16 Q With relation to August 28, 1967, when you used

17 the word "embezzlement" in a conversation with the attorney

18 Joseph Balsamo, did you have in mind in your mind when you

19 used that word at that time that the defendant intended to

20 deprive the rightful owner of funds, of money?

21 MR. EATON: I object to each of these uses, your

22 Honor.

23 THE COURT: Yes, it is the same question.

24 Q Were you familiar, Mr. Watson, with the United

25 States Supreme Court decision in the Wilcox case when you were-

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RECORDED IN COURT HOUSE

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2 MR. AUERBACH: Your Honor, in order to avoid a
3 discussion about which we have had a previous off-the-record
4 discussion, may we approach the side bar?

5 THE COURT: Yes.

6 (At the side bar.)

7 MR. AUERBACH: Your Honor, at this time I wish to
8 ask the witness whether or not it was a fact that an additional
9 reason for not reporting this as an embezzlement loss was due
10 to the fact that he felt the defendant took the money from
11 the Lees' account without any criminal intent, which is a
12 contradictory statement made by the defendant and should be
13 able to be used to impeach him at this point.

14 THE COURT: Well, as I indicated earlier whether
15 the defendant had criminal intent in this case is for the
16 jury and what you are trying to get out of this witness is
17 his opinion it was not criminal intent.

18 MR. AUERBACH: Not on this case. I am not discussing
19 his intent on this case. That is not the issue I am getting
20 to. His intent on this case is strictly a question for the
21 jury, what was his intent on April 17, 1967, when the returns
22 were filed, but we have here repeated allegations by the
23 witness to various people, three different people, that
24 there was an embezzlement, and we also have a statement by
25 the witness that the reason that he did not recommend the

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Watson-Cross

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2 deduction was but he felt they couldn't substantiate the
3 fact that there was no likelihood of recompense and that is
4 an additional reason and the jury is entitled to know that
5 additional reason and cross examination.

6 THE COURT: Let me see it.

7 MR. AUERBACH: This is his affidavit.

8 (Handing to the Court)

9 MR. EATON: Your Honor, it is obvious now why Mr.
10 Auerbach went into the unexpressed thoughts of Mr. Watson,
11 he was trying to get in this document, in violation of your
12 Honor's order.

13 On my direct testimony I stayed within the rules, I
14 did not go into Mr. Watson's unexpressed desires and reasons,
15 I just went into what he said to Mr. Balsamo and what he said
16 to Mr. Fredrickson, which obviously had an impact, and they
17 reacted accordingly.

18 Now Mr. Auerbach has gone ahead and asked for Mr.
19 Watson's unexpressed reasons and I think the thing to do is
20 to strike that testimony. He can't adopt a line of question-
21 ing and then get this in under the guise of impeachment. He
22 has gone beyond the scope of my direct examination by getting
23 into unexpressed thoughts of Mr. Watson and even when they
24 are relatively harmless, they are just as irrelevant as if
25 there was something like this. It is Watson's unexpressed

1 desires. I couldn't care less if Watson did not like the
2 shape of Mr. Fredrickson's nose, that has no bearing at all,
3 unless he can show bias against Mr. Fredrickson. But his
4 reasons for acting are irrelevant. The relative thing is
5 what he said to Fredrickson and what Fredrickson said to
6 him, not what was going on in the back of Watson's mind.
7

8 THE COURT: The reason this can't be brought out,
9 as I indicated before, is because it calls upon the witness
10 to give his opinion as to a conclusion the jury has to make
11 here. The jury has to conclude first that he embezzled the
12 money or that he took it by mistake, and this testimony
13 would be simply introduced to give the jury an opinion as
14 to whether he took the money or he took it by mistake --
15 whether he embezzled the money, rather, or whether he took
16 it by mistake. We can't have witnesses giving their opinion
17 as to somebody's state of mind. It will not be admitted.

18 MR. AUERBACH: I respectfully except to the
19 Court's ruling on that the issue of whether or not there was an
20 embezzlement is not on trial here and that is not before the
21 Court.

22 THE COURT: That is ridiculous. Your defense is
23 that he took it by mistake?

24 MR. AUERBACH: Yes.

25 THE COURT: The Government's burden is to prove he

embezzled it.

MR. AUERBACH: It is my further contention that this man in his conversations was contradictory, and that he threatened exposure of embezzlement and going to the D.A. and to the I.R.S. and that he in his own mind when he made those statements knew there was no embezzlement and that is a proper subject for cross examination.

THE COURT: That is my point: he is not qualified, permitted to give his opinion as to whether it was or was not an embezzlement, in his view.

MR. AUERBACH: But if his honest statements -- according to Mr. Eaton, the reason for the line of questioning and the answers which came back was, as Mr. Eaton stated, Mr. Watson made a statement and this was a reaction from Mr. Balsamo and Mr. Fredrickson and if when Mr. Watson made that statement he knew at that time that that statement was not right or he was bluffing, I think that should be brought out before the jury, that he knew in his own mind when he said embezzlement loss or embezzlement, in his own mind he knew there was no such embezzlement, that these were efforts on Mr. Watson's part to try and recoup as much money as possible for the estate and for that reason he used the word embezzlement but knew in his own mind at that time that there was no embezzlement. As proof of that, we have a sworn

1 affidavit that he knew at that time there was no embezzlement,
2 and this is a very critical thing to the defendant's position.
3 He may have had made reactions, but if he made reactions
4 through an improper claim, I honestly feel that that was
5 improper and should be brought out at this time. This would
6 be the same thing as a motion to suppress by unfair pressures
7 by the district attorney. This was an unfair pressure on
8 his part and any reactions from that unfair pressure should
9 be eliminated.
10

11 MR. EATON: It only matters what Mr. Fredrickson
12 heard and what he did about it. If Mr. Fredrickson said,
13 "What, embezzlement, not on your life," that would be an
14 objective fact we should take into account. You can ask
15 Mr. Watson whether Mr. Fredrickson reared up in disgust
16 when the word embezzlement was raised.

17 MR. AUERBACH: If in Mr. Watson's mind he knew
18 there was no embezzlement and we have the uncontradicted
19 fact that he knew there was no embezzlement, that should be
20 brought out to the jury.

21 MR. EATON: Why should Mr. Watson ever be allowed
22 to tell his opinion. Mr. Watson may be a Communist which
23 doesn't think there is any such thing as embezzlement, and I
24 don't care what his opinions are.

25 THE COURT: Are those letters in evidence?

MR. EATON: No. I put in letters that went to Mr. Fredrickson. I did not put in Mr. Watson's notes. He had a partial recollection of his own and the only thing in evidence, as in the last trial, is his recollection of the words used at those meetings.

THE COURT: I thought there were three letters --

MR. AUERBACH: May I get that, your Honor?

THE COURT: Yes.

MR. EATON: Not letters.

(Pause)

MR. AUERBACH: There was a letter written on or about October 13th to Cohen and Fasman which specifically referred to embezzlement.

THE COURT: I thought you asked Mr. Watson about it. Didn't you ask him what he meant in that letter by embezzlement?

MR. AUERBACH: No, I said in a conversation.

MR. EATON: This is 947 for identification, your Honor, and all that Mr. Watson testified about was that after he had this crucial discussion with Mr. Fredrickson, he called off Mr. Fasman -- Cohen and Fasman. He called Max Cohen and said, "Do not claim any kind of a loss."

MR. AUERBACH: No, he said, "Do not claim an embezzlement loss."

MR. EATON: Well, that is not in evidence. He identified this letter, 947, just by saying that was the letter he wrote to Cohen and Fasman.

On the assumption that the word embezzlement was used in connection with the conversation with Max Cohen, I will consent to a motion to strike it. It has no relevance to anything. If he told Max Cohen the guy was a thief, who cares? The important thing is he told Max Cohen just what he told Fredrickson would happen, "I will call off the dogs, not tell the I.R.S.," and he told Max Cohen, "Max, don't tell the I.R.S." Whether he told him the guy was a thief or an embezzler doesn't matter.

THE COURT: I thought there was in evidence three letters in which the witness Watson said to Fredrickson in effect, "it was embezzlement. You said there were three separate occasions and I had in mind 948, 949 and 950, the three letters, and I thought you were bringing out that he wrote Mr. Fredrickson and accused him of embezzlement and I permitted you to ask what he had in his mind, what he meant when he used the term, not to establish the legal elements of that crime through this witness. I was under the impression you were referring to three letters. Now it turns out that 947 isn't even in evidence. So you were the one that injected in this Mr. Watson's conclusion that he was

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1 guilty of embezzlement. The answer to that is plain, that
2 Mr. Watson can't get on the witness stand and say that the
3 defendant is guilty of embezzlement. He can only testify to
4 certain facts, and even if he were on trial for embezzlement,
5 he couldn't get up and say he was guilty of embezzlement and
6 he couldn't say even now that he was guilty of income tax
7 evasion, could he?

8
9 MR. AUERBACH: No, your Honor.

10 THE COURT: The defendant can only be convicted of
11 a crime after a trial by jury and the question is improperly
12 in and would have to be stricken.

13 MR. AUERBACH: The question was, as the Court
14 indicated, the defendant can only be convicted of a crime
15 after a trial before a jury, and he has never been charged
16 with that crime and for that reason I object to this whole
17 line of questioning on the question of embezzlement. He
18 can't be convicted of a crime without a trial by jury and
19 that is what we are doing here. We are trying him on income
20 tax evasion and collaterally convict him of embezzlement.

21 THE COURT: The jury has to consider that in
22 arriving at a conclusion, but no witness can testify he is
23 guilty of embezzlement. His defense is mistake and they will
24 have to find first that it was no mistake, that he took it
25 improperly and, therefore, it was taxable. No witness can get

1 on the stand and say he is guilty of embezzlement. That is
2 all I am going to hear on that.
3

4 MR. AUERBACH: He has said it, your Honor --

5 THE COURT: The question and answer will be
6 stricken.

7 MR. AUERBACH: May I get my notes?

8 THE COURT: On what? I thought you were referring
9 to separate letters.

10 MR. AUERBACH: No, three separate occasions where
11 he was reviewing and stating from his notes.

12 THE COURT: It shall be stricken and the jury so
13 advised.

14 MR. EATON: The three occasions Mr. Auerbach mentioned
15 occurred in the testimony of Mr. Watson as he was telling
16 all conversations he had with Mr. Fredrickson and with Mr.
17 Balsamo in which he used the word "embezzlement loss."

18 I don't think that testimony can be stricken because it is
19 entirely relevant to the key fact in this case, which Mr.
20 Fredrickson denies, is that the thought of
21 embezzlement never came into his mind and here is Mr.
22 Watson saying he used the word embezzlement. I would consent
23 to have the jury instructed that the fact that Mr. Watson
24 said the word embezzlement to Mr. Fredrickson is not binding
25 on them. Nevertheless, we can't take out the key circumstance

1 in this set of conversations, which is that right
2 after he filed his income tax returns Mr. Fredrickson was
3 told, "I am going to report an embezzlement loss to the I.R.S.,
4 and he came up with all these crazy reasons why that should
5 not be done. The word embezzlement had to make an impact
6 on Mr. Fredrickson, but I agree the jury be instructed
7 it can only be considered for what impact it had on the
8 defendant.
9

10 THE COURT: The jury can be so instructed, but it
11 seems to me the Government can't have it both ways. You
12 already have it in here that Mr. Watson discussed it with
13 the defendant and they talked about embezzlement. If it is
14 in that way, defense counsel does have a right to ask about
15 the statement he made and you can tell the jury and I will
16 charge them that they are not bound by Mr. Watson's conclusion
17 either that it was embezzlement or was not.

18 MR. EATON: I would analogize it to a murder
19 case, if the cop came up to the defendant and said, "You are
20 guilty of murder," and the defendant said, "Yes," and later
21 he was tried for murder and the jury could be instructed
22 that the cop is no expert on murder, but it is pretty relevant
23 evidence when the defendant says yes in answer to the question
24 which can only be understood when you say the question was,
25 "You are guilty of murder?"

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1 committed or was not committed. No witness is permitted to
2 testify that a defendant committed a particular crime. He may
3 say it, but the Court has to instruct the jury as to what
4 constitutes a particular crime and the jury is not bound by
5 anybody's conclusion as to whether a crime has been committed
6 or has not been committed, and that is one of the things that
7 the jury here is going to have to determine, whether the
8 money was taken as a result of embezzlement or whether the
9 money was taken by Mr. Fredrickson as the result of an
10 honest mistake. That is what you have to decide. You are
11 not bound by Mr. Watson's conclusion as to whether it was
12 embezzlement or not embezzlement, but you can ask the question.

13 Q Isn't it a fact that an additional reason for
14 advising Cohen and Fasman not to report this as an embezzlement
15 loss was because you came to the belief that these checks
16 had been drawn on Mrs. Lee's account without any criminal
17 intent but had been, rather, the result of emotional stresses,
18 a confused mind, and general professional disorganization
19 on the part of Mr. Fredrickson?

20 A Well, I don't recall whether that was in my mind
21 when I wrote to Cohen and Fasman. It was most certainly the
22 reason why I made no report and didn't recommend that any
23 report be made to a district attorney, because that was
24 something I did not want to do.
25

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2 MR. AUERBACH: It is the defendant's contention
3 at this time, even though this is a retrial, a motion to
4 dismiss, even if it was not granted previously because
5 of counsel's ineffectiveness and by the virtue of my working
6 to establish to the satisfaction of the Court the people
7 haven't proved the element of willfulness, which must be
8 proven by certain specific facts, and I don't have the
9 case material with me and this is what I wanted for the
10 morning. I believe I can find that and even though the Court
11 denied the motion the last time, the Court can hear arguments
12 at this time only on that issue and the Court can come up
13 with a different decision. There is no reason that the
14 Court is bound to deny the motion because it was denied
15 previously.

16 MR. BITOL: Your Honor, on the issue of willful-
17 ness, there is enough to go to the jury, just the fact that
18 the man is a lawyer, which is now in evidence, thanks to the
19 Grand Jury, and was in the tax department and there is a stipu-
20 lation that there was extra tax owing if this was gross
21 income, which I submit should be charged as a matter of law,
22 but there is enough there to go to the jury right now.

23 THE COURT: Yes, that is obvious. Any motion to
24 dismiss for failure to prove a prima facie case or submit
25 evidence from which the jury could conclude that the defendant

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2 A No, there were two.

3 Q Did you share the responsibilities?

4 A We did.

5 Q Did there come a time when you fulfilled most of
6 the functions of both Justices of the Peace in Tuxedo?

7 A Judge Stevens had a bad heart attack --

8 Q When was that?

9 A '63, I believe. For about two years he was not
10 functioning at all. During that time I handled the work for
11 the whole town.

12 Q In addition to your practice of law and the work
13 as Justice of the Peace, did you do any public work at that
14 time?

15 A I worked for the ambulance corp, organized them,
16 draw up their charter, bylaws, gave them any advice they
17 wanted. I worked with the Episcopal church and the Catholic
18 church, at various times. I was school attorney for about
19 eight years, had a \$100 a year retainer.

20 Q Going back to the time you came back from the
21 Army, what was the state or condition of your marriage?

22 A It sort of fell apart.

23 Q What do you mean by that?

24 A That is a hard question to answer. The first night
25 I came home, we pulled into Ft. Dix and the troop trains were

lined up, about six or seven of them, and I found out we wouldn't get into camp until the morning and two of us jumped the train and went into Philadelphia and took the train to Journal Square, Jersey City. My parents lived in Jersey City and at that time we were renting a place from my mother-in-law in Weehawken, and I was able to get home about one o'clock in the morning and I was anxious to see my daughter and I looked in and my wife told me to look in the room with a flashlight and not to wake the child up or pick her up, and during the night several times I was referred to by a different name --

Q By whom?

A By my wife.

Q How did you feel about that?

A Well, it hit me and I just figured the best thing to do is just forget about it.

Q Well, you remained married, didn't you, for many years thereafter?

A I did.

Q Would you say that this was a quiet marriage?

A Pardon me?

Q Was it a quiet marriage?

A There was a lot of arguing.

Q Let's bring the marriage up to 1964. Would you say

1 that in 1964 the situation at home was the same as it was '50,
2 '52, '56, '58?

3
4 A No. It became progressively worse.

5 Q What do you mean by progressively worse?

6 A Well, that is a --

7 Q I can't hear you.

8 A I am trying to think of an easy way to say it.

9 The peak of the disturbance was in my oldest daughter's
10 last year in high school. She and Gail were fighting all
11 the time -- she was fighting with Gail all the time. Gail
12 was getting ready to go to college and my wife never
13 finished high school and I got the feeling that she was
14 jealous or envious of my daughter, being that she was able
15 to go to college. There were times her mother and father
16 would call up during the day and I would get home and she
17 would have my daughter in the closet, slapping her. Jan
18 was two years old and I would have to quiet Jan down, separate
19 the two of them, quiet Gail down and go back to the office
20 and try to work.

21 Q How did you feel about these incidents?

22 A I was very disturbed over them. I didn't want
23 it that way. I would rather see the two of them get along.

24 Q Did it affect you in your work?

25 A It did.

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Q In what way?

A Lots of times I would get down to the office at night to pick up where I left off in the daytime and I actually couldn't recall what I had been working on when I left the office at 4:30 or five o'clock.

Q Did this start happening with greater frequency?

A It did, yes.

Q When it came to administering to the Lees' checks, finances, doing the work for them, what was the procedure you used? How did it work on a day-to-day basis?

A Mrs. Stevens was my secretary, with me for about eight years, and she kept the books current in her desk. We tried to reconcile the bank statements as it came in, but the Lees had checkbooks at home they were drawing checks from, on their own, and it became impossible to reconcile. First, court work kept me going on a full-time basis, and my own practice, because of the court work, was falling behind. Bess just didn't have enough time to attempt to -- initially we tried to glue the checks back in the book but the accumulation was such that you couldn't keep up with it.

Q Take the year 1965; do you recall if you filed an individual tax return or joint tax return for the Lees that year?

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on its own initiative to bar associations or law enforcement agencies?

A No.

Q You did not realize that in 1967?

A No.

MR. AUERBACH: I object, your Honor. It calls for a statement of fact.

THE COURT: Read the question.

(Question read)

THE COURT: The objection is what?

MR. AUERBACH: The objection, your Honor, is misstating a matter of policy by another agency. We have no testimony that that was, in fact, the policy.

THE COURT: The question, I gather, was directed to this witness' own knowledge, is that it?

MR. EATON: Yes, and his answer was no.

THE COURT: Since he was a tax lawyer? Is that it?

Q You did not realize that in 1967?

A No.

Q You had specialized in tax law on Wall Street for twelve years, from 1948 to 1960?

A When you say "specialized," there are certain phases we specialized in, estate and trust work, the main

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find corroborated by other evidence in the case.

Now, the law doesn't compel a defendant in a criminal case to take the witness stand and testify and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify. However, a defendant who wishes to testify may do so and is a competent witness.

Now, the defendant's testimony is to be judged in the same manner as that of any other witness, as I have just described.

Now I want to tell you a word about expert witnesses, because we did have one, Dr. Fabrikant, who testified here today. That expert gave testimony concerning his qualifications as an expert in the field of psychology. When a case involves a matter of science or art or some field requiring special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion for the information of the Court and the jury.

The opinion stated by the expert who testified before you was based upon particular facts as the expert himself observed them and testified to, or were based upon facts which the attorney who questioned him asked him to assume for the express purpose of stating an opinion based upon the assumed facts. You may reject an expert's opinion

1 if you find the facts to be different from those which
2 form the basis for his opinion. You may also reject his
3 opinion if after careful consideration of all the evidence
4 in the case, expert and other, you disagree with that opinion.
5

6 In other words, you are not required to accept an
7 expert's opinion to the exclusion of the facts and circum-
8 stances disclosed by other testimony. Such an opinion is
9 subject to the same rules concerning reliability and credibility
10 as the testimony of any other witness, as I have just ex-
11 plained.

12 The testimony of an expert is given to assist you
13 in reaching a proper conclusion and is entitled to such
14 weight as you find the expert's qualities warrant and must
15 be considered by you but is not controlling upon your judg-
16 ment.

17 Now, there are two classes of evidence recognized
18 and accepted in courts of justice upon either of which you
19 may find an accused guilty of a crime. One is called direct
20 evidence, the other is called circumstantial evidence.

21 Direct evidence tends to prove the fact in issue
22 without need for any other amplification, although, of course,
23 there is always the question whether that evidence is to be
24 believed.

25 Circumstantial evidence, on the other hand, tends

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1 With regard to the first element, that is, that
2
3 defendant had taxable income, the parties have stipulated
4 that the defendant received income from the practice of law
5 and from his position as a Justice of the Peace and that he
6 properly paid whatever tax was due on that income. The
7 parties have further stipulated that in 1964, 1965 and 1966
8 the defendant received the benefit of approximately \$79,000
9 by writing checks on the account of the Lees without their
10 consent.

11 As I said before, defendant contends that he
12 withdrew the money from the Lees' account by mistake. How-
13 ever, when a law abiding taxpayer mistakenly receives in-
14 come in one year which receipt is challenged and found to be
15 invalid in a subsequent year, the taxpayer must, nonetheless,
16 report the income as gross-income for the year received and
17 then if he has paid a tax on that income and if he later repay
18 some or all of the money, the law allows him to count the re-
19 payment as a deduction, but only in the year when he finally
20 repays and only to the extent that he actually does repay.

21 I, therefore, charge you as a matter of law that
22 money received by mistake is taxable income and that it is
23 irrelevant that defendant may have later entered into an
24 agreement to repay the money and did, in fact, repay a portion
25 of it.

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2 acquit the defendant of the charge of willfully attempting
3 to evade or defeat the tax.

4 In this connection, you should consider the defen-
5 dant's contentions. The defendant contends, as I said before,
6 that at the time he filed his return he had erased from his
7 mind the taking of the money from the Lees' account. In
8 this connection, also, that is, with respect to the third
9 element, you should consider the testimony of Dr. Fabrikant,
10 the psychologist, who testified that the defendant had erased
11 the incident from his mind, in his opinion. Thus, if you
12 find the whole episode of the taking of the money was completely
13 blocked out of the defendant's mind at the time he prepared
14 his returns, you must acquit him.

15 Now, in deciding what a man knew and what a man
16 intended, you do not have, as I said before, any crystal
17 ball, that will enable you to look into a man's mind. You
18 must consider, however, all the circumstances and facts
19 surrounding the situation.

20 The defendant has testified, as I said, that he
21 was emotionally upset at the time and just simply forgot.

22 On the other hand, the Government points to the
23 evidence that the defendant tried to persuade Mrs. Lee's lawyer
24 Mr. Watson, not to report her loss to the Internal Revenue
25 Service, that defendant was a lawyer, with some knowledge of

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